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IN THE

Supreme Court of the United States

October Term, 1931

No. 672

PLANTERS COTTON OIL COMPANY, INC., OF WAXAHACHIE, et al.,

Petitioners,

vs.

GEORGE C. HOPKINS, COLLECTOR INTERNAL REVENUE FOR THE SECOND DISTRICT OF TEXAS

Respondent.

SUPPLEMENTAL BRIEF FOR PETITIONERS

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INDEX

First Specification of Error 2
Argument Thereunder 2-13
Second Specification of Error 13
Argument Thereunder 13-26

AUTHORITIES CITED

Sec. 984 USCA 9, 11
Sec. 985 USCA 9
Sec. 986 USCA 9
Sec. 937 USCA, Section 206 (b) Internal Revenue Act 10
Aiello vs. Crampton, 201 Federal 891 15
Alabama By-Products Corporation vs. Commissioner, 18 BTA 919 7
Boatright vs. Radio Corporation, 46 Federal (2) 385 (CCA-10) 21
Burnett vs. Moore Cotton Mills, 49 Federal (2) 59 (CCA-4) 8
Darby Linde Co. vs. Commissioner, 51 Federal (2) 32 20
Donnell vs. Herring-Hall, 208 U. S. 267, 52 Law Ed. 481 15
First National Bank of Chicago vs. U. S., 283 U. S. 142, 75 Law Ed. 913 24
Georgia Railway vs. Georgia, 289 Federal 878 ..... 16, 17
Hamilton Ridge Lumber Co. vs. Wilson, 25 Federal (2) 592 (CCA-3) 22
Jackson vs. Thomas, 46 Federal (2) 252 (CCA-5) 19

Klein vs. Board of Supervisors, 282 U. S. 19, 75 Law Ed. 140 ..... 15, 20

Marr vs. U. S., 268 U. S. 536, 69 Law Ed. 1079 20

Moore Cotton Mills vs. Commissioner, 17 BTA 662 ..... 4, 5

On Appeal, 49 Federal (2) 59 (CCA-4) 5, 6

National Slag Co. vs. Commissioner, 47 Federal (2) 846 (CCA-3) 6, 14, 21

R. C. L. Vol. 7, p. 27 23

United States vs. Milwaukee Refrigerator Co., 142 Federal 247 22

Winfield vs. Wichita Natural Gas Co., 267 Federal 47 ..... 15, 17

Woolford Realty Co. vs. Rose, Com's, 53 Federal (2) 821 (CCA-5) 10

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Petitioners desire merely to file a brief supplementing the one filed herein in support of the Petition. The Statement of the Case, shown on pages 1 to 5 inclusive of the Petition, is here referred to without repetition. Petitioners set out in the Petition what they conceived to be the controlling issues in this case as "First Is-

sue", Petition, page 5, and "Second Issue", Id., page 6. Specifications of the errors complained of are found on pages 14 and 15 of the Brief in Support of the Petition. It is the Petitioners' purpose now merely to supplement the argument contained therein, which will be confined to Specifications of Error numbered 1 and 2.

FIRST SPECIFICATION OF ERROR

> The Circuit Court of Appeals erred in finding and holding that a statutory "net loss (within the meaning of Section 206-b of the Revenue Act of 1926) incurred by a corporation in one year (the fiscal taxable year ending June 30, 1924), when not affiliated, may not be used to reduce consolidated net income (within the meaning of Section 240 of the Revenue Act, 1926) of an affiliated group, of which such corporation is a member, in a subsequent year (the fiscal taxable year ending June 30, 1925) in which the corporation which has sustained the "net loss" does not have gross income in excess of the deductions allowed by Section 234 (a) of the Revenue Act of 1926. (Brief in Support of the Writ, pages 14–15.)

Section 206-b of the Revenue Act is copied on page 18 of Petitioners' original Brief. The phrase to be construed reads as follows: "shall be allowed as a deduction in computing the net income of the tax payer".

It will be noted that the controlling statute provides that, in computing the net income for the second. year, the amount of the net loss sustained by the tax payer during the preceding taxable year *"shall be allowed as a deduction in computing the net income* of the tax payer for the succeeding taxable year", or second year, and it also provides that

> "If such net loss is in excess of such net income (computed without such deduction), the amount of such excess *shall be allowed as a deduction in computing the net income* for the next succeeding taxable year", the third year. (Italics supplied.)

We call the Court's attention to the fact that the phrase *"shall be allowed as a deduction in computing net income"* is identically the same, word for word, for the second year as for the third year. Prior to 1924, the act, as it applied to the second year, did not read as it now does, but for the second year, the following language was used in lieu of the above quoted phrase: "shall be deducted from the net income" of the succeeding or second year. The act of 1924, as applied to the second year, instead of providing as it had theretofore that the net loss for the first year shall "be deducted from net income", was changed so as to read: "shall be allowed as a deduction in computing the net income". It is the contention of the defendant that the two phrases: "shall be deducted from the net income" and "shall be

allowed as a deduction in computing the net income" are identical in meaning, and, even if they are not, the Court will, nevertheless, of necessity (for reasons hereinafter stated) so construe them. This the Petitioners controvert, believing that the Board of Tax Appeals was correct in stating that the two clauses are "fundamentally different".

The case of Moore Cotton Mills vs. Commissioner, 17 BTA, 662, arose under the Act of 1921, which provided that, for the second year, the net loss of the preceeding year "shall be deducted from the net income" of the second year, but that, for the third year, the amount of the excess loss of the second year "shall be allowed as a deduction in computing net income" for the third year. While the case did not involve affiliated corporations, it did involve, and in fact the only thing that was involved was, the meaning of the latter phrase —the very one now in question, word for word, "shall be allowed as a deduction in computing net income". Prior to this decision, the Board of Tax Appeals had held in conformity with the views of the defendant here. The Board points out that it had prior thereto so held but observes that, for the first time,

> "Our attention is directed to the fundamental difference in the provisions of the statute covering 'the succeeding taxable year', and 'the next succeeding taxable year'."

"For the second year, the law provides that such loss shall be deducted from the net income of the tax payer; for the third year the clear and unmistakable language of the Act provides that any excess of the net loss remaining after it has been applied against the net income of the second year 'shall be allowed as a deduction in computing the net income for the next succeeding (third) taxable year."

The Board further held that the regulations of the Commissioner to the contrary were without effect.

"The power of federal legislation lies solely in Congress, and in our opinion that part of the regulation of the Commissioner which we have italicized and which provides that the excess of the net loss over the net income of the second year 'shall be carried over and credited against the net income for the next succeeding (third) taxable year', where Congress has clearly provided that 'the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year', is an erroneous construction of the act and goes beyond the power delegated to the Commissioner."

The Government appealed this case to the Circuit Court of Appeals, 4th Circuit, 49 Federal (2) 59, and the decision of the Board was *affirmed*. The Circuit

Court of Appeals, in its opinion, quotes the pertinent parts of the opinion of the Board, and adds:

> "We believe the above conclusion of the Board and the reasoning upon which it is based to be sound, and feel that little need be added to what the Board has said."

Undoubtedly the Government there argued, as here, against "minus net income", an impossibility, and such a result leading to "absurdity", as the Court adds:

> "But we do not concede that there is in fact any real ambiguity, much less that the result here produced is absured, albeit there may be no sound reason for saying that while net loss shall not be an item in the computation of net income for the first succeeding taxable year it shall be in the computation of net income for the second succeeding year."

The Circuit Court of Appeals for the Third Circuit has also passed upon the question favorable to the contention of Petitioners. This Court, in the case of National Slag Company vs. Commissioner, 47 Federal (2) 846, says:

> "The deductions of the losses here in question, sustained in 1922 and 1923 come directly within the provisions of the statute which are plain, certain and unambiguous."

It also quoted from and approved an opinion rendered by the Board of Tax Appeals in the Alabama By-Products case, 18 BTA 919, as follows:

> "The 1924 Act contains materially different provisions from those of the 1921 Act with respect to the treatment of net losses, in that the 1924 Act provides that a net loss shall be allowed 'as a deduction in computing the net income of the tax payer', for the succeeding taxable year, whereas, the corresponding provision of the 1921 Act requires that a net loss shall in the first instance be allowed as a deduction from net income."

The Alabama By-Products case further used this language:

> "The excess of the net loss of 1919 over the 1918 net income is, by plain language of the statute, put in the same category as any other deduction allowed by statute in determining net income for the taxable year",

the same as interest paid, taxes and other proper deductible expenses or losses. But the defendant, as we understand it, contends that the construction placed upon the phrase in question, while reasonable, is untenable and impossible, because there is and can be no such a thing as a "minus net income", and the Circuit Court of Appeals adopts this view.

We respectfully submit, however, that the Comissioner is now permitting the tax payers to do the very thing that the Circuit Court of Appeals holds to be a physical impossibility. In the case of Burnett vs. Moore Cotton Mills, supra, (decided April 13, 1931), the Court uses this language:

> "Lastly, if further support were needed for the conclusion here adopted, it is to be found in the form in which Section 204 (b) of the Act of 1921 was redrafted in the Act of 1924 (Section 206-b) and carried into each subsequent Act. That redraft is as follows: '(Here Section 206-b is copied in full.)' (43 Stat. 260, and 44 Stat. 17.) (26 USCA Section 937 (b)); Section 117 (b), 45 Stat. 825, (26 USCA Section 2117 (b)).
>
> "As a result of this redrafting, the Treasury Department has redrafted its Regulations and has ever since construed Section 204 (b), as thus amended to allow the net loss to be treated as a deduction, in computing the net income for both the second and third years. See Regulations 65, Article 1622; Regulation 69, Article 1622; Regulation 74, Article 652. Since the amendment incorporated, with respect to the application of the net loss to both the second and third years, the same language that was used in the 1921 Act with respect to the application of the net loss to the third year, and since thereafter the Treasurer Department has applied exclusive-

ly the rule here contended for by the tax payer, the commissioner's present position is at least inconsistent, and without persuasive force."

Again, if there can be no such thing as a "minus net income", this litigation becomes absolutely moot, for in such a case there can be no loss from the first year to be carried forward to the second, and no "excess" from the second to be carried forward to the third. Take two tax payers, both required to and do make out income tax returns, one of whom has sustained a net loss. In making their respective returns, can it be said that they each in so doing "compute their net income"? We think so, but the defendant contends that the one computes his "net income"; the other does not and cannot, but computes his—what? Lack of net income? Net loss? But "net income" of a corporation is defined in the statute. It is defined by Section 984 (USCA), as follows:

"Net income means the gross income as defined in Section 985, less the deductions allowed by Sections 986 and 937 and the net income shall be computed on the same basis as is provided in Subdivisions (b) and (d) of Section 953, or in Section 968."

Now Section 986 (U. S. C. A.) provides:

"In computing the net income of a corporation subject to the tax imposed by Section 981 of this

chapter, there shall be allowed as deductions", (naming ordinary and necessary expenditures in the operation of the business, rentals, salaries, interest and taxes paid, losses sustained, worthless debts, and so forth), while

Section 937 (U. S. C. A.) expressly mentioned in Section 984 as containing other allowable deductions, is Section 206 of the Act, Section (b) thereof being the very one involved here. It is the identical section that authorizes the tax payer who has sustained a net loss for any taxable year to be allowed the amount thereof as a deduction in computing his net income for the next succeeding taxable year.

In the Woolford case, companion case to the one at bar, 53 Federal (2) 821, the Court looks upon the deductions provided in Section 986 as kind of usual and ordinary deductions, and those provided in Section 937 as unusual and extraordinary. It says:

> "Of course, if appellant is right in its assumption that the statutory net loss deductions (provided in Section 937) "must be treated like any other deduction" (as provided in Section 986), 'in making up a consolidated return, it is right in its conclusion that it should have had the benefit of it here."

We find no authority or justification for the deductions provided in Section 986, except that it is so pro-

vided in Section 984, and that very same section provides for the deduction set out in 937. Why should they be treated differently, or not be "treated like any other deduction"?

If defendant is correct in his contention that the deductions mentioned in the respective sections should be treated differently and that there cannot be a "minus net income", then the Court would of necessity read Section 984, as follows:

> "Net income means the gross income as defined in Section 985, less the deduction allowed by Section 986, in so far and until such deductions shall equal the gross income after which there shall be no further deductions because there is nothing left from which to deduct it, and there can be no minus net income. But if the gross income exceeds the deductions provided for in Section 986, then the deductions mentioned in Section 937 may be allowed in so far and until such deductions shall equal any balance of the gross income after allowing the deductions provided for by Section 986, after which there shall be no further deductions, because to allow further deductions would result in a minus net income, and this leads to absurdity and impossibility."

By such reasoning, there can never be a loss for any taxable year to carry forward to the next succeeding

taxable year, for the reason that there is no statutory method by which to determine it. In order for the tax payer to ascertain his net loss for any taxable year to be carried forward to the next succeeding taxable year, it is required that he "compute the net income of the corporation", according to the statutory formulas, and, as there can be no minus net income there is no way of ascertaining the loss.

There is not, so far as we know, one statute which provides the formula for the tax payer to use in computing his net income and another and a different one for the use in computing his net loss. The only statutory method provided for the tax payer to ascertain his "net loss" is the formula provided in the statutes herein above set out, which defines "net income"; that is, taking the tax payer's "gross income", as defined, less the statutory deductions as provided, and the difference is the net income. Sadly enough no method was provided by which the tax payer is assured that this difference will always be positive, never negative.

We, therefore, respectfully submit that the deductions authorized by Section 937 (U. S. C. A.) 206-b are to be treated in the same manner, as expressly provided in Section 984, and that the only formula known to the Act by which the net income may be ascertained, is to enter in the return the gross income of the tax payer as provided (Section 985) less the deductions au-

thorized by Section 984, which are those mentioned alike and without distinction, in Sections 937 and 986.

SECOND SPECIFICATION OF ERROR

The Circuit Court of Appeals erred in holding that:

(a) The fact that one person owns all or substantially all the stock of the corporations at all times does not change the rule set out in the First Specification of Error, of which holding error is therein assigned.

(b) The fact that the tax ultimately fell on one individual who was the owner at all times of substantially all the stock in all the companies involved, the five companies so owned having been created by carving three out of the two which had sustained the net loss, did not alter the general rule set out in the First Specification of Error, which holding is therein assigned as error.

The question raised by the Second Specification of Error is plainly stated by the Circuit Court of Appeals, as follows:

"Were this a case as that one was (Woolford Realty Company vs. Rose) of corporate affiliation of interest theretofore distinct, brought about after the net losses had been sustained, we should dispose of this case by a mere reference to that opinion.

> Since, however, the differentiating facts appear here as they did in the case of National Slag Company vs. Commissioner, 47 Federal (2) 846, that one person has at all times been substantially the owner of all the stock in all of the companies involved, and the tax ultimately fell on him because he at all times owned all the companies, in the Slag case two companies so owned having been consolidated, in this case, five companies so owned having been created by carving three out of the two which had sustained the net loss, it becomes necessary for us to determine whether these differences in fact require a different legal conclusion. We do not think they do."

The Circuit Court of Appeals, in deciding that "we do not think they do", came to the very opposite conclusion to that reached by the Circuit Court of Appeals, Third Circuit, in the Slag case, above mentioned. This fact, it concedes, in stating that "the differentiating facts appear here as they did in the case of National Slag Company vs. Commissioner . . ."

The Circuit Court of Appeals in the instant case held, as we understand it, that corporate entity may never be disregarded, except "to circumvent fraud", and particularly should the rule of adhering to corporate entity be adhered to in tax matters.

In support of the proposition that corporations and the stock holders thereof are essentially distinct entities, the Court cites Donnell vs. Herring-Hall, 208 U. S. 267; 28 S. Ct. Rep. 288; 52 Law Ed. 481, and Klein vs. Board of Supervisiors, 282 U. S. 19, 51 S. Ct. 15, 75 Law Ed. 140, 73 ALR 679. The former case deals only with the question of unfair competition in the use of one's own surname, such surname having been used in the name of an incorporated company, while in the latter case, the only question decided was that a statute of Kentucky which provided that share holders in a corporation should render the same for taxation and pay taxes thereupon, except

> "The individual stock holders of a corporation, at least seventy-five per cent (75%) of whose total property is taxable in Kentucky, shall not be required to list their shares for taxation so long as the corporation pays taxes on all its property in Kentucky."

This act was attacked as violative of certain provisions of the Federal Constitution, as constituting double taxation. The Court held that the corporation was a separate entity (following the conceded general rule) and refused to nullify the act as violative of either the equal protection or due process clauses thereof. The Court refused to apply the "fiction doctrine" to the corporation by refusing to declare a state statute un-

constitutional. It did make the following observation, however:

> "If the corporation, having all its property in the state, has paid taxes upon the whole, usually it would be just not to tax the stock holders in respect of value derived from what already has borne its share."

This expression causes no surprise because it simply states what appears right to every fair minded man, and, besides, is in conformity with the Federal policy in regard to double taxation, as announced in the National Bank Act, which *does not* permit the shares of stock and the capital stock both to be taxed.

The Court of Appeals then adds that the fact that one person does own all or substantially all of the stock of the corporation does not change the above announced rule, and cites the following cases in support of the proposition:

Georgia Ry. vs. Georgia, 289 Federal 878;

Winfield vs. Wichita Natural Gas Co., 267 Federal 47;

Aiello vs. Crampton, 201 Federal 891.

In the Georgia Railway case, which arose out of a controversy between the Railway Company and the State Public Service Commission, it appeared that the South-

ern Railway owned 69½% of the stock of the Georgia Railway. The Court said:

> "We think these two corporations are separate and distinct railroad companies, not under one management or operation, and that the traffic relations between the same should be governed by the said rules as pertain between other connecting lines. *To hold otherwise ignores the rights of the minority stockholders.* * * *" (Italics supplied.)

The following excerpt is copied from the decision in the cited case of Winfield vs. Gas Company, supra:

> "Counsel for the city throughout the discussion of this case, have earnestly contended that the court, in the treatment of the parties to it, should ignore the difference between the rights and liabilities of the two defendants, between the rights and liabilities of the alleged sole stockholder of the Winfield Natural Gas Company, the Wichita Company, and the rights and liabilities of the Winfield National Gas Company; that it should disregard the express limitations of the special agency of the Winfield National Gas Company for the Wichita Company created by the Hackney Supply contract, treat the former as the general agent of the latter, empowered to bind it by an agreement of assumption of the obligation of Patterson and his successors, when it had no such authority; and that the

Court should reinstate the injunction on the theory that the parties were in effect one, and that that one ought to discharge the obligation of Patterson and his successor under the ordinary contract. *If equity and justice demanded such a course of action by a court of equity, some of the contentions which counsel might make might be lawfully sustained;* but the complaint and evidence in this case have satisfied that equity and justice demand that that this course should not be pursued." * * *(Italics supplied.)

This states exactly the contention of petitioners. The Court of Appeals holds herein, as shown above, that the separate legal entity of the corporation will not be disregarded except to "circumvent fraud". We do not so understand the rule in regard to its application. We contend that the correct rule is announced in the City of Winfield case, as follows: That the legal entity of the corporation will be disregarded when substantially all of its stock is owned by one person, and such a course is demanded by equity and justice. Of course, we do not contend that the rule does not also apply when necessary to prevent fraud, but we do say that it does not apply only to cases of fraud.

The other cases cited, the Aiello case, is a bankruptcy case. It is not shown what per cent of the stock in the corporation Aiello owned, except that he owned most

of the stock". The Court refused to apply the alter ego doctrine. Suppose that Aiello had owned, not merely most of the stock, but all of it, except qualifying directors shares, what would have been the holding then? Let the Court of Appeals of the Fifth Circuit itself answer this question in a case presenting facts somewhat similar: Jackson vs. Thomas, 46 Federal (2) 252. M. H. Thomas individually executed the note sued upon. The note was endorsed by the M. H. Thomas Investment Company, a corporation, of whose stock Thomas, the maker of the note, owned sustantially all the stock. The corporation endorser plead in defense ultra vires, no authority from the Board of Directors authorizing Thomas as President of the corporation to endorse the note, and want of consideration.

> "The reply of the plaintiff to these defenses is that the corporate defendant was the alter ego of the individual maker of the note, and that the law will, for that reason, disregard the separate identity of the corporation and treat its property as the property of the individual maker, as much so as if the title were in him, instead of being in the corporation.
>
> "The law", says the Court, "is so settled, in cases where the corporation is the mere alter ego of the indivdual and in which the rights of creditors and other third persons of the corporation are not involved."

The Court of Appeals, after holding that, as a general rule, the corporation and the stock holders are essentially distinct (which we concede); further held that, to circumvent fraud, the corporate entity may be disregarded; and the fact that one person owns substantially all of the stock of the corporation does not affect the matter, and

> "Particularly is it true as regards matters of taxation and matters of governmental fisc, that the members of a corporation and the corporation itself are essentially different entities."

In support of the last holding it cited the case of Klein vs. Supervisors, supra, and the additional cases of Darby Linde Company vs. Commissioner, 51 Federal (2) 32; Marr vs. U. S., 268 U. S. 536, 45 Sup. Ct. Rep. 575, 69 Law Ed. 1079. We have examined the cases cited, and respectfully submit that neither of them determines the question here. That tax cases do arise in which the Courts correctly apply the rule that the entities of the corporation and of the stockholders are distinct cannot, of course, be denied. If it is the holding of the Circuit Court of Appeals in the instant case (and we believe that it is) that the Courts will in every instance, as regards taxation, treat the members of the corporation and the corporation itself as essentially different entities, unless tinctured with fraud, we submit that the Court of Appeals is in error, and that it does so hold is shown by the further language used:

"Fradulent pretense absent, the government accepts the tax payer as it represents itself to be, and one may not, chameleonlike, change that appearance to suit his necessity or conscience."

The cases cited in the original brief specifically cite tax cases, decided by this and other Federal Courts, holding to the contrary. Brief in support of the Petition, pages 23-31. The very proposition for which we here contend was sustained in the *Slag* case (Circuit Court of Appeals, Third Circuit), 47 Federal (2) 846. The Court of Appeals in the instant case expressly admitted that the decision in the Slag case supports petitioners' contention, but refuse to follow it.

It is simply the position of petitioners that the acceptance of the "alter ego", or "fiction" theory in respect to a corporation and its stockholders is not confined to any particular line of cases, nor does it depend upon any particular state of facts. It applies in any kind of a case, including tax cases, when the facts of that particular case justifies its application, whether to prevent a fraud or to prevent a wrong or to prevent a crime, and even in cases where public convenience demands it.

In the case of Boatright vs. Radio Corporation, (CCA 10) 46 Federal (2) 385, the Court says:

"Corporate entity may be disregarded in cases where not to do so will defeat public convenience, justify wrong, protect fraud, or defend crime."

The substance of the above language was used in the case of United States vs. Milwaukee Refrigerator Transit Company, 142 Federal 247, and has since been used in other cases with approval.

In the case of Hamilton Ridge Lumber Company vs. Wilson 25 Federal (2) 592, 595 (CCA 3), the Court says:

> "Nor can I agree with the contention of counsel for the bank that this doctrine (of looking behind the corporate set up) is applicable only in cases where the corporate entity has been resorted to for purely fraudulent and criminal purposes. I do not find that the rule is subject to any such limitation, but, on the contrary it is applicable wherever reason and justice require its application, though the act of the parties amounts to constructive fraud only". (Citing authorities) "In support of his contention, that the rule is applicable only in cases where actual fraud is involved, counsel for the bank cites Cannon Mfg. Co. vs. Cudahy Packing Co., 267 U. S. 333, 49 Sup. Ct. Rep. 250, 69 L. E. 634; and Conely vs. Mathieson Alkalai Works, 190 U. S. 406, 23 Sup. Ct. Rep. 728, 47 L. E. 1113, but I submit that an examination of these cases will show that, as far as the facts are concerned, neither of them is in point."

In 7 R. C. L., page 27, is found the following language:

> "The doctrine, however, that a corporation is a legal entity existing separate and apart from the persons composing it is a mere fiction, introduced for the purpose of convenience and to subserve the ends of justice. This fiction cannot be urged to an extent and purpose not within its reason and policy, and it has been held that, in an appropriate case, and in furtherance of the ends of justice a corporation and the individual or individuals owning all its stock and assets will be treated as identical * * *." * * * Again corporate existence as an entity distinct from its members may be ignored in order to circumvent the fraudulent purpose of the share holders in its organization."

No one, we suppose, could be found who would contend that the courts would not be justified in looking through corporate form, if necessary so to do, in order to prevent the government from collecting a tax otherwise just and righteous. Then why deny the courts that same right in order to prevent the collection of a tax that is both unjust and unrighteous? The Circuit Court of Appeals in its opinion practically admits that the tax is unjust when it says that the facts of this case, as well as those in the Slag case, present a situation

> "of which, if the matter were to be determined upon consideration of general fitness, it might well

be said, as the Court did in the Slag case: 'It seems on principle that the provisions of Section 206 should apply to the consolidated return of these affiliated companies."

The Circuit Court of Appeals further says that the law stands in the way of affording protection to the citizen, which he would otherwise, on the ground of "general fitness", be entitled, as his rights "must rest upon the express terms of the statute." But the Circuit Court of Appeals does not refer to the express terms of any statute. However, it cites the cases of Woolford vs. Rose, Busch vs. Commissioner, 50 Federal (2) 800, and First National Bank of Chicago vs. U. S., 283 U. S. 142, 51 Sup. Ct. Rep. 378; 75 L. E. 913.

In the case of First National Bank of Chicago vs. U. S., supra, it appears that the Bank was affiliated with two other corporations, the Joint Stock Land Banks of Chicago and Dallas. As we understand the ruling therein made, it was that the National Bank was not allowed to make deductions on account of interest paid or accrued upon the outstanding bonds of the two joint stock land banks, affiliated with it, not on the ground that the loss must be purely personal to the individual tax payer sustaining it, but on the grounds:

(1) Section 234 of the Revenue Act plainly provides that no deduction should be made for interest paid

on indebtedness incurred to purchase securities or carry obligations, the interest upon which, as was the case of the land banks, was wholly exempt.

(2) Section 213 provides that "gross income" does not include interest upon "securities issued under the provisions of the Federal Farm Loan Act. * * *"

It is a long way from the facts of that case to the facts of the one at bar. Petitioners earnestly insist that there is not to be found the "express terms" of any statute supporting the views of the Circuit Court of Appeals in the instant case, as there was to support the Court's views in the Chicago Bank case. We readily concede that "general fitness" would have to submit to the express terms of the statute where there is one; but general propositions derived from decisions are not tantamount to "express terms" of a statute. We submit that, in the absence of "express provisions of a statute", the case should be determined by its own equities, or "general fitness" to be derived from the facts of that case. We know of but one case "on all fours" with this one, the Slag case, admittedly in point as to facts, decided by the Circuit Court of Appeals, Third Circuit, and which fully sustains petitioners' contention. Not only do petitioners take issue with the Court of Appeals in its conclusion that the "express terms" of some undesignated statute precludes the court from disregarding a paper or book set up as is the case here, thereby com-

pelling payment of a substantial amount of taxes upon an income that never in fact existed, but, on the contrary, we submit that the statute contemplates the very thing we contend for, in that it provides that where one person owns more than 95% of the stock in two or more separate corporations, such corporations may become affiliated and make a consolidated return. (Section 993, I. R. Act.) Upon no apparent theory may such corporations become affiliated except for the reason that the one person who owns substantially all the stock in each of the corporations is in reality the tax payer and the tax ultimately falls upon him.

The case is respectfully submitted with the prayer that the judgment of the Courts below be reversed.

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